

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO. 502013CA018773XXXXMB

GARY JAMES MOROCCO,
Petitioner,

v.

THE STATE OF FLORIDA
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
Respondent.

Opinion filed: **APR 11 2014**

Petition for Writ of Certiorari from the Department of Highway Safety and Motor Vehicles.

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PER CURIAM.

The Petitioner's driver's license was suspended for refusing to submit to a breath test after being arrested for suspicion of Driving Under the Influence ("DUI"). *See* § 322.2615, Fla. Stat. (2013). At the formal review hearing, the Hearing Officer considered the "D.U.I. Probable Cause Affidavit" (hereinafter "PC Affidavit"), which contained the arresting officer's written statements regarding probable cause for the arrest. The Petitioner objected and moved to invalidate his suspension because the PC Affidavit was not a valid affidavit for two reasons. First, the PC Affidavit itself lacked a proper jurat. Second, the PC Affidavit, along with the

other documentary evidence submitted, was submitted to the hearing officer with a “D.U.I. Enforcement Case Report” (hereinafter “Case Report”), which was apparently intended to be a catch-all coversheet affidavit that applied to all of the documents submitted. Petitioner objected because the Case Report was not itself an affidavit, and even if it was, it did not incorporate the PC Affidavit by reference. The Hearing Officer overruled Petitioner’s objections and found that all elements necessary to sustain the suspension, including probable cause, were supported by a preponderance of the evidence. Petitioner raises the same issues on appeal and argues that based on the alleged deficiencies there was no competent substantial evidence in the record to support the hearing officer’s finding of probable cause. We agree.

The PC Affidavit is the only document in the record that identifies the basis for the arresting officer’s probable cause to believe Petitioner was driving under the influence. The PC Affidavit does not contain a jurat and therefore does not qualify as an affidavit. *See Bordwell v. DHSMV*, 20 Fla. L. Weekly Supp. 957a (Fla. 15th Jud. Cir. 2013) and *Schwartz v. DHSMV*, 20 Fl. L. Weekly Supp. 87a (Fla. 15th Jud. Cir. 2012). Thus, the only way that the PC Affidavit can be considered an affidavit is if the Case Report was a valid affidavit that incorporated the PC Affidavit.

The Case Report is also not an affidavit. An affidavit is a written statement made under oath and administered by a duly authorized person.” *Youngker v. State*, 215 So. 2d 318, 321 (Fla. 4th DCA 1968). “An oath may be undertaken by an unequivocal act in the presence of an officer authorized to administer oaths by which the declarant knowingly attests the truth of a statement and assumes the obligation of an oath.” *Id.* It is essential that there be a jurat clause wherein the affiant unequivocally attests to the truth of his statements for perjury to be actionable. *See Collins v. State*, 465 So. 2d 1266, 1268 (Fla. 2d DCA 1985). A valid affidavit

must (1) be sworn to by the affiant in an unequivocal and present act (2) in the presence of an officer authorized to administer it, and (3) be punishable by perjury if proven false. *See Markey v. State*, 37 So. 53, 59 (Fla. 1904). The Case Report does not contain the proper jurat clause and therefore does not qualify as an affidavit.

Assuming arguendo that the Case Report was a proper affidavit, the Case Report still fails to incorporate the PC Affidavit. To incorporate by reference a collateral document, the incorporating document must (1) specifically provide “that it is subject to the incorporated [collateral] document” and (2) the collateral document to be incorporated must be “sufficiently described or referred to in the incorporating agreement” so that the intent of the parties may be ascertained. *Kantner v. Boutin*, 624 So. 2d 779, 781 (Fla. 4th DCA 1993) (quoting *Hurwitz v. C.G.J. Corp.*, 168 So. 2d 84, 87 (Fla. 3d DCA 1964)); *BGT Grp., Inc. v. Tradewinds Engine Servs., LLC*, 62 So. 3d 1192, 1194 (Fla. 4th DCA 2011).

In the instant case, the Case Report does not incorporate any of the documents by reference. Absent from the Case Report is a declaration that the PC Affidavit is subject to incorporation. Further, the Case Report does not describe the PC Affidavit. Thus, the Case Report does not satisfy the requirements of incorporating a collateral document by reference.

Since the PC Affidavit was the only document before the Hearing Officer that could support a finding of probable cause, and pursuant to section 322.2615(2) it is required to be in the form of an affidavit, we find that the Hearing Officer’s finding of probable cause was not supported by competent substantial evidence. Accordingly, the Petition for Writ of Certiorari is **GRANTED** and the Order of the Hearing Officer is **QUASHED**. The Petitioner’s Motion for Attorney’s Fees and Costs is **DENIED**.

HAFELE, COX and BROWN, JJ., concur.